BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The United States District Court for Puerto Rico filed no opinion in the case, but the findings of fact and conclusions of law dated September 19, 1940, are found in the record at pages 30-33. They are not reported. The opinion of November 18, 1941, of the United States Circuit Court of Appeals for the First Circuit will be reported in Volume 123 of the Federal Reporter, Second Series. It is found in the record at pages 958-982, inclusive.

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 938). The judgment of the Circuit Court of Appeals for the First Circuit was entered November 18, 1941 (R. 982).

Questions Presented.

The questions presented are stated in the petition.

Statutes Involved.

The statutes involved are The Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. A. 201, et seq.). This Act went into effect October 24, 1938. Also involved is Act No. 3 of the Legislature of Puerto Rico, approved May 6, 1920, entitled "An Act for the Incorporation and Organization of Cooperative Systems of Production and Consumption", as amended by Act No. 162 of the Legislature of Puerto Rico, approved May 10, 1938, and by Act No. 16 of the Legislature of Puerto Rico, approved

April 9, 1941. Puerto Rican Act No. 3 of 1920, as amended, is set out in full as Appendix I to this Brief.

ARGUMENT.

Point I.

The Circuit Court of Appeals, First Circuit, was wrong in holding that Santiago R. Palmer and Magdalena J. Palmer, Manager and Assistant Manager respectively of the Caribbean Embroidery Cooperative, Inc., control the business thereof and not the worker-members.

The Circuit Court of Appeals, in a 29-page opinion, holds that the Palmers, or rather, Santiago R. Palmer, controls the Cooperative. The Court admits that "no particular piece of evidence is decisive of the issue of control" (R. 976). It considers numerous details of the business, both as to the formation of the Cooperative, and as to the charter and by-laws which determine the legal structure of the Cooperative. Details as to the operation of the business, as they appear from the minutes of the Board of Directors and of the Executive Committee, are also referred to by the Circuit Court. The most important of these details are considered herewith.

A. *As to the formation of the Cooperative.*—The petitioner Santiago R. Palmer is accused of having participated in the organization of the Cooperative. We submit that there is no reason why he should not have advised and aided his employees in the formation of a cooperative. It is quite clear from his testimony in the record that Palmer knew that he would have to close down his business (R. 745, 776). It is also clear that he understood that the laborers might take over the business and operate it as their own without having any difficulties in regard to the Fair Labor Standards Act. It was only natural that he

should be interested, for he would probably have the chance to lease his buildings and equipment to the Cooperative and avoid a loss in the liquidation of the business. Doubtless he also hoped to be able to secure the position of Manager for the Cooperative since the workers knew that he had experience and valuable contacts in New York which are necessary for this type of business.

Palmer also, in a letter, stated that the Cooperative would be dissolved when it should be no longer necessary for the employers to meet the requirements of the Act (R. 962). Of course, Mr. Palmer could not dissolve the Cooperative. A statement such as that has no probative value and simply expressed a hope. Palmer may also have thought in making this statement that it would influence the laborers toward forming the Cooperative by presenting the situation as if it were temporary and thus to allay any fears of change among workers, most of whom at the outset were quite ignorant of the meaning of cooperative work. The laborers were traditionally accustomed to the employer system, that is, to work for a wage, and to encourage them to undertake a cooperative system of work, it is logical enough to attempt to present it to them as temporary.

The Circuit Court also refers to the fact that when the incorporators were selected the total number of workers inside the plant did not exceed one hundred forty and that the total number of workers represented by the eight incorporators did not exceed two hundred thirty (R. 964). The petitioners have no objection to admitting that in regard to home workers who should have been members of the Cooperative, mistakes were made and that the District Court properly enjoined them in that respect. Certainly all the other workers aside from home workers were adequately represented at all times and the home workers under the Articles of Incorporation and the By-Laws are entitled to membership in the Board of Directors.

According to the law for the formation of cooperatives of consumption and production in Puerto Rico (Appendix I), seven or more persons of legal age can form a cooperative and admit whatsoever number of new members they desire, who meet the requirements set up according to the Charter and By-Laws. In the instant case, a public meeting of all the workers was called in a public theater to discuss the advisability of forming a labor cooperative and at this meeting the whole assembly took steps for the formation of the Cooperative. Approximately two hundred people were present at that meeting (R. 914) and although according to the statutes seven persons could legally take the initiative in incorporating the organization, the full meeting selected incorporators from the different processes of the business. It does not seem that the fact that the home workers were not represented among the incorporators would have any bearing on the question at issue. There was no reason why they should not be represented, but there was no particular reason why they should be, especially considering the general idea which prevailed at that time that home workers were not covered in any event. By the time the Complaint in this case had been filed in Court a great many home workers had been admitted as members of the Cooperative and they had a representative in the Board of Directors.

Another detail which the Circuit Court of Appeals points out (R. 970) is that while Attorney Soltero was working on the Articles of Incorporation and the By-Laws, Palmer described the workings of the Caribbean Embroidery Company to him, although Palmer had not yet been selected by the Cooperative as its Manager. Also that when the Articles of Incorporation were completed, Soltero showed them to Palmer. This statement would seem to suggest that it was wrong on the part of the Attorney who was drawing up the Articles and By-Laws for the laborers to discuss thor-

oughly the nature of the needlework business with the man who knew all of the details of it. We submit that it was both proper and natural, unless the Attorney was also thoroughly familiar with the details, to discuss the structure of the business with the man who knew. The interest of Mr. Palmer in the new organization has always been freely acknowledged, as he expected to salvage something of his business either through leasing his equipment or by being employed as Manager or both.

The Circuit Court states in its opinion (R. 977) that the approval of the Articles of Incorporation and By-Laws by the workers was never secured. According to the Cooperative Law (Appendix I), the Articles of Incorporation need be approved only by the incorporators. Other members admitted to membership subsequently are presumed to have a knowledge of the Articles of Incorporation and of the By-Laws. The evidence shows that great efforts were made to inform as many laborers as possible of the nature of the Cooperative (R. 916, 920) and the Circuit Court disregarded the evidence in the record showing that whenever a member was admitted he had to know in a general way the Articles and By-Laws of the Cooperative (R. 228, 229, Exhibit 12A plaintiff; R. 243 ff., Exhibit 20 plaintiff). Exhibit 12A is a form of application for membership and Article Second in the form of application states that the signers know the Articles of Incorporation and By-Laws and Article 6 states that the applicants are in accord therewith. These applications for membership are taken before a Notary Public. Exhibit 20 of the plaintiff beginning on page 243 of the record was a pamphlet distributed to all worker-members and to all applicants for membership which explained fully the nature of the Cooperative and the working principles of the Caribbean Embroidery Cooperative, Inc. We ask the Court to examine especially the testimony of Juan Enrique Soltero appearing in pages 911-940 of the record. The testimony of

Mr. Soltero on page 924 where reference is made to "this pamphlet", refers to Exhibit 20 of the plaintiff as does the question and answer at the bottom of page 923 of the record. We submit that every reasonable effort was made to educate and encourage the workers in true cooperative work.

The Circuit Court felt that the Articles of Incorporation and the By-Laws were calculated to maintain control in a very small group of workers most naturally inclined to be friendly to Palmer. We submit that this is not according to the record. The original incorporators were freely elected at the assembly of workers which was attended by approximately two hundred. This was the meeting at the "Teatro Sol" referred to both by Mr. Soltero in his testimony and by Mr. Palmer in his testimony (R. 914 ff., 731, 723). In his speech to the workers at that assembly, Soltero asked them to select for incorporators those individuals whom they believed to be the best prepared. The workers acted of their own free will in this selection, and if the incorporators selected by the assembly were friendly to Palmer, that was a tribute to the relations which he had previously maintained with his workers. In any event, under the Articles of Incorporation and the By-Laws, the general assembly of worker-members is the ultimate supreme authority of the Cooperative and no small group could possibly control the Cooperative for any length of time and a majority of the members of the association in each of the processes of the industry had power to remove any director or official (Article 22 of the Charter, R. 51).

We submit in general that it was perfectly logical and proper for certain persons to take the initiative in the formation of the Caribbean Embroidery Cooperative, Inc. and that such is true in the formation of any organization. We submit further that so far as operation and control are concerned, the Articles of Incorporation and the By-Laws lodge no more power in the directors, officers and in the

Manager than would be necessary for the proper functioning of any business. It is especially important for organizations of workers to have efficient management, since from their very nature they are more subject to divisions and similar difficulties.

B. *The Articles and By-Laws of the Cooperative.*—In the record, at pages 973-980, the Circuit Court of Appeals in its opinion refers to the Articles of Incorporation and By-Laws. However, the Court below ignores other provisions of the Charter and the By-Laws which are very important in connection with the question of control. For example, on page 979 of the record the Circuit Court of Appeals points out in Article 245 of the By-Laws that the decision of the Committee on Discipline will not bind the Manager. This is true as a separate statement, but it is only half true in the whole picture, because although the Discipline Committee could not bind the Manager, both the Board of Directors and the general assembly of workers can bind the Manager for the future and reverse decisions of the Manager made in the past (R. 53, 60-67, 91, 130).

In the record, at page 984, the Circuit Court of Appeals states that the Manager of the Cooperative holds the workers in a state of economic subservience because he can disfranchise any member or any number of members at any time by suspending them. This conclusion is contrary to the provisions of the Articles of Incorporation and the By-Laws. Articles 249 *et seq.* (R. 111) provide that in case of infractions of discipline, the Manager may *suspend* a worker *temporarily*, but shall immediately submit the case to the Committee on Discipline. The member who has been subject to disciplinary action by the Manager on recommendation of the Committee of Discipline, may appeal to the Board of Directors and then to the general assembly if he is not satisfied with the decision of the Board of Directors. Article 194 (R. 101) and Article 200 (R. 102) of the By-Laws

provide that the General Manager will be responsible to the Board of Directors for the discipline of the worker-members and may act in representation of the Board of Directors in any matters which the Board might delegate to him. Any worker-member who has been expelled by the Board of Directors has the right to be heard before the general assembly (Article 81 of the By-Laws, R. 82) although such member whose case is on appeal does not have a right to vote on his own case (Article 79, R. 81). The Manager, quite contrary to the opinion of the Court below, cannot act arbitrarily, for sooner or later he has to face the Board of Directors and the general assembly to answer for his conduct. It is true that the Manager can make temporary decisions of moment and, of course, it is conceivable that in the exercise of his power to make such temporary decisions he may commit injustices against members, but it would seem inevitable that ultimately any arbitrary actions would only discredit him before the Board of Directors and the general assembly. Under reasonable principles of business administration, it would seem that the temporary power of the Manager to suspend a member of the Cooperative for disciplinary reasons is amply justified. To hold otherwise would be to hold that one member bent on injuring or breaking up the Cooperative would have the power to seriously disturb the morale and efficiency of the organization until the Board of Directors should meet. A small group under such circumstances could keep the Cooperative in turmoil and seriously affect the business. We earnestly submit that the disciplinary provisions are reasonable, and in any event the general assembly can change them if it sees fit to do so.

The Circuit Court of Appeals (R. 975) says that the earnings of the workers before and after the formation of the Cooperative remained practically the same. The advances provided to the workers by the Cooperative, in advance of the annual liquidation of the business for the year,

were approximately what the members had previously been receiving as wages. However, it should be noted that at the end of the first year the amount available for distribution as dividends to the members in proportion to the hours worked and in accordance with the rules for the division of the income dollar, was $9,803.23 (R. 755), which otherwise and under the employer system, of course, would have gone to the employer. The allotment of the gross-income dollar of the Cooperative is provided for in the By-Laws (Exhibit 2 plaintiff, Articles 305-315, especially Article 314, R. 123, 124, 125). Whether the earnings of the workers were lower or higher under the cooperative system than received previously as wages under the employer system, would depend entirely upon the prices obtained in the continental United States for the products of the Cooperative and the amount of work done. It should be noted that prices under the Cooperative system are much more important than volume, whereas under the employer system volume may be much more important than prices. If the statement of the Circuit Court of Appeals should be correct, it can be attributed only to the economic fact that the ruling prices in New York for work of the type produced by the Cooperative were low. The Cooperative alone could not change those prices. There is no question but what if prices should go up in the future the earnings of the members of the Cooperative would go up correspondingly. In any event, under this cooperative system, the member-workers got all there was in the business. It may have been a good business or a bad business, but good or bad it was the business of these members of the Cooperative. They owned it and through the Executive Committee composed of worker-members and the Board of Directors composed of worker-members, they controlled the acceptance or rejection of orders and the distribution of work and exercised the control which any owner exercises over his business.

C. *Relations with Palmer.*—The Circuit Court in its opinion emphasizes the fact that Palmer, in addition to his contract with the Cooperative as Manager, also had loaned money to the Cooperative for its necessary capital, had leased his equipment to it and had rented his buildings to it. The Court infers from this that Palmer controls the Cooperative. We submit that the lease of the buildings and equipment and the lending of money in this case were normal and natural procedures (R. 892, 893). Efforts had been made to secure a loan from the Puerto Rico Reconstruction Administration, a Federal Government agency, but those efforts failed. It would probably have been absolutely impossible to secure a loan from any other source except Mr. Palmer (R. 777-779). The buildings and machinery formerly used by Palmer were located in the town of San Germán, in or around which most of the workers lived. There is no indication that any other buildings or machinery whatsoever were available to the Cooperative on equal terms or in fact on any terms at all. The valuations of the buildings and equipment for the purposes of the lease contracts were passed upon by a Committee of the workers. *The Cooperative was no more subservient to Palmer nor dominated by him on account of these contracts than is any debtor subservient to or dominated by his creditor.* The relation of debtor and creditor has usually been one in which the creditor exercises some measure of control over the debtor and the only cure for this situation is for the debtor to get out of debt. There is no question but what if this Cooperative should be allowed to operate without molestation by the Government, in time it would accumulate under good management sufficient capital to free itself from its debts and obligations to Palmer or to anyone else. If it did not borrow money from Palmer or had not leased buildings and equipment from Palmer, it would have had to lease buildings and equipments and borrow money from some other person, in which case it

would have stood in relation to this other person the same as it stands with Palmer and doubtless the Government would then have alleged that it was "controlled" by the other creditor. It is true that the Management Contract is tied in with the other contracts, but this is a question of independent bargaining between the Board of Directors and the Cooperative on the one hand and Palmer on the other. Palmer may very well have hoped that if he could not continue as Manager of this Cooperative he might lease his services and equipment to others. In any event, when the Cooperative shall have accumulated enough capital to free itself of debt and to stand on its own feet without borrowing money or leasing equipment, it will certainly be completely free of any so-called "control". The vice of the Government position throughout in this case has been that it expected a Cooperative organization of extremely poor people to spring full-fledged, like Pallas Atheme from the brow of Zeus, into an organization with independent capital in place of working up to an independent position through time, labor and growth. Certainly the premises offered the Cooperative by Palmer were the only ones available at the time. Whether the Cooperative in the future can make other and more advantageous arrangements is a question the answer to which cannot be predicted as yet. The various contracts with Palmer were freely entered into and although the need to work and earn a living may be alleged as a force or motive actuating the workers to accept the conditions of the contracts, the same forces would operate in regard to any other person or entity.

On the whole record there certainly can be little if any criticism of the various contracts. If the Cooperative is allowed to continue to function it will in a more or less short time work itself out of any subservience to its creditor.

Regarding Palmer's income before and after the forma-

tion of the Cooperative, the court below incurs in the same confusion as did the plaintiff, that is, a comparison is made between the *net* profits of Palmer prior to the formation of the Cooperative and the *gross* receipts thereafter. Any comparison of net in one year with gross in another is of no value. From the total gross receipts of Palmer from the Cooperative contracts would have to be deducted the following items before net could be reached for a comparative basis:

1. Depreciation on his buildings.

2. Depreciation on the equipment which he leased to the Cooperative.

3. Repairs to the buildings and replacement and repairs of equipment.

4. Purchase of additional equipment as needed by the Cooperative.

5. Traveling expenses on the business of the Cooperative.

6. Traveling expenses of other persons whom he might use in the administration or management of the Cooperative business.

7. Compensation to the Assistant Manager or any other permanent or temporary employee necessary in the management.

8. Taxes on buildings and equipment.

9. Insurance on buildings and equipment.

The balance would go to pay him for his services as Manager of the Cooperative and, of course, the Cooperative was also buying in Palmer's salary his valuable commercial contacts in the States. See Clause 15 of the contract between Palmer and the Caribbean Embroidery Cooperative, Inc., at page 284 of the Record. If the Board of Directors of the Cooperative preferred to put all of the management

expenses in this form, it is difficult to see why they should be criticized for doing so. The record does not show the specific cost of these different items to Palmer which would reduce his gross income to a figure comparable to his previous net income, but any reasonable consideration of the matter will show that the total of these expenses must have been considerable. At any rate, Palmer's net income as Manager of the Cooperative must have been considerably less than his net income in 1937, when he was an independent enterpriser. Probably a reasonable figure for his net income for the first year of the Cooperative would be around $6,000 or $7,000 and it could hardly be alleged that a salary of $7,000 as Manager of the Cooperative was excessive. Had the old employer-employee system prevailed, Palmer would have certainly received, in addition to this $7,000 net income of his salary, the $9,803.21 surplus of the Cooperative (R. 507).

Point II.

There exists no employer-employee relationship within the meaning of the Federal Fair Labor Standards Act of 1938 between the Cooperative and its worker-members.

In fact a statute such as the Federal Fair Labor Standards Act of 1938 *could not* apply to a labor cooperative such as the Caribbean Embroidery Cooperative, Inc., for the very practical reason that a person could not be made to pay himself more than he had. If it should be held that the members of the Caribbean Embroidery Cooperative, Inc., are employees of themselves or that the Cooperative as a separate entity is an employer of its member-workers, then it is clear that the member-workers would have a cause of action against themselves in the Cooperative for the difference between what they received for their work and the minimum set by the Federal Act. In order to pay

such a judgment the very member who had the judgment would have to raise the funds to pay it unless it could be paid from the reserves of the Cooperative provided for in Articles 313-317 (R. 124, 125) of the By-Laws of the Cooperative, which is also his own money. In other words, if the reserve set up by the Cooperative were sufficient to pay such a judgment, it could be paid out of such reserves which already belonged to the same persons. If the reserves were not sufficient, the judgment could not be paid unless the member-workers of the Cooperative raised the money among themselves to pay themselves. In this connection it must not be overlooked that if the supposition be adopted that the Caribbean Embroidery Cooperative, Inc., is an employer, then the same relation between the payments to the different processes in the work will in all probability have to be maintained because of the contract among the workers themselves acting through the Board of Directors, that is to say, the division of the dollar among the processes. The Federal Fair Labor Standards Act fixes minimum wages, but not maximum wages, and Section 18 provides in part:

> "No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act or justify any employer in increasing hours of employment. * * *"

If we examine Articles 314, 315, 316, 317 and 328 of the By-Laws of the Cooperative beginning on page 124 of the Record, we see that if, for example, the workers of the Caribbean Embroidery Cooperative, Inc., had a total claim against themselves as owners of the Cooperative, and if the reserve of the Cooperative established by the law or by its own regulations were insufficient to pay its claims, the money would have to be raised by a contribution from

each worker himself in proportion to the cooperative work done by him. This would then be distributed in accordance with Article 317 of the By-Laws, that is, in proportion to the cooperative work realized by each member and the result would be that each member with a claim against the Cooperative had paid himself.

Regarding the status of cooperatives in general under the Federal Fair Labor Standards Act, the Wage and Hour Division of the Department of Labor itself gave out a press release or interpretation which appears at pages 159 and 160 of the record. Due to the fact that there exists an infinite variety of cooperatives, the decision or interpretation by the Wage and Hour Division is not conclusive as to all cooperatives. In other words, of course, a cooperative *may be* an employer just as any other employer in which case the Act would apply, but it is significant that the Wage and Hour Division recognized that there may be worker-cooperatives in which the interests of the members as workers are in all cases the same as their interest as proprietors. This is exactly the case of the Caribbean Embroidery Cooperative, Inc. We quote herewith the pertinent paragraph from that official release.

> "Any doubt which exists must be based on the notion that cooperatives are, in effect, partnerships and that no employer-employee relationship exists between them and the members who work for them. *Although it is possible that there may be 'workers' cooperatives in which the interests of the members as workers are in all respects the same as their interests as proprietors and in which the usual characteristics of the employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act*, it is to be noted that cooperatives are commonly separate entities in which the usual characteristics of the employer-employee relationship exist as between them and worker-members. Cooperatives

> are generally in the corporate form with interests distinct from those of their members. Though their workers may be stockholders, as workers they are subject to the usual control and discipline of the corporate employer; they work at the discretion of the cooperative's board of directors or other managerial body. Their concern, as workers, with wages, hours of work and other working conditions, is quite distinct from and may be much greater than their interest, as stockholders, in profits or dividends." (Italics supplied.)

So far as this Cooperative is concerned, it is evident, as was found by the Court below, that the interest of each worker-member as a worker is identical with his interest as a proprietor.

In order for the Federal Fair Labor Standards Act to apply, there must exist the relation of employer and employee between the parties. Section 3(d) of the Act reads as follows:

> "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States or any state or political division of a state, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

The relation of master and servant is, of course, quite old and well known to the law. One of the most essential tests in determining the relation of master and servant is the power of hiring and discharging and another important element in the relation is the control of the master over the employment, and the details thereof, of the servant.

> "The words 'employer' and 'employee' are doubtless the outgrowth of the old terms 'master' and 'servant', and have been adopted by reason of, and in deference to, the exalted position that labor has acquired by the

education of the masses. The relation, whatever term may be used to describe it, exists, it ordinarily is said, whenever one person stands in such a relation to another that he may control the work of the latter and direct the manner in which it shall be done. (Boswell *v.* Laird, 8 Cal. 469, 68 Am. Dec. 345; Sickles *v.* Mather, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521; McColligan *v.* Pennsylvania R. Co., 214 Pa. St. 229, 63 Atl. 792, 112 A. S. R. 739, 6 L. R. A. (N. S.) 544; Hand *v.* Cole, 88 Tenn. 400, 12 S. W. 922, 7 L. R. A. 96) (18 R. C. L. 493)."

"The essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist. (Baltimore Boot, etc., Co. *v.* Jamar, 93 Md. 404, 49 Atl. 847, 86 A. S. R. 428; and all other cases cited in the preceding paragraph) (18 R. C. L. 493)."

"The most universal and unfailing test in determining the relation of master and servant is the power to discharge. It has been decided and this court has stated the rule to be that the relation of master and servant does not exist unless it includes the right to discharge. (Densby *v.* Bastlett, 318 Ill. 616, 149 N. E. 591; 42 A. L. R. 1411; Foster *v.* Wadsworth-Howland Co., 168 Ill. 514, 48 N. E. 163; Pioneer Fireproof Constr. Co. *v.* Hansen, 176 Ill. 100, 52 N. E. 17; Harding *v.* St. Louis Nat. Stock Yards, 242 Ill. 444, 90 N. E. 205; Connolly *v.* People's Gaslight & Coke Co., 260 Ill. 162, 102 N. E. 1057)."

"The right to control the work, not only the result of the work, but also the means and manner of its performance, reserved to or possible of exercise in the employer, establishes and maintains the relation of master and servant and negatives that of proprietor and independent contractor. (See 14 R. C. L. 67; 3 R. C. L. Supp. 164; 4 R. C. L. Supp. 869; 5 R. C. L. Supp. 738) (Dobson *v.* Portland Sebago Ice Co., 124 Me. 305, 128 Atl. 401, 42 A. L. R. 604; Messmer *v.* Bell & C. Co., 133 Ky. 19, 117 S. W. 346, 19 Ann. Cass. 1)."

In 39 C. J. 33 ff., the relation of master and servant is stated several times with conciseness.

"Sec. 1. A. Definitions. The relation of master and servant is that which arises out of a contract of employment, express or implied, between a master or employer upon the one hand and a servant or employee upon the other hand.

"Master. He is deemed to be a master who has the superior choice, control, and direction of the servant, and whose will the servant represents not merely in the ultimate result of the work, but in the details."

"Sec. 2. B. Creation and Existence of Relation.—1. Essentials of Relation.—a. In General. The relation of master and servant arises out of contract; the assent of both parties is essential; hence the relation does not arise between employees and one who has made advances to, or guaranteed the accounts of, the business in which they are employed, or even one who has agreed with the owner to pay the salaries of employees."

"Sec. 4. c. Direction and Control.—(1) In General. The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done. Inasmuch as the right to control involves the power to discharge, the existence of the power to discharge is essential, and is an indicium of the relationship. A mere authority to direct the course of a third person's servant is not inconsistent with his remaining the servant of such third person, and the mere reservation of the right to discharge or inspect the work of employees of another will not create the relation when it did not otherwise exist."

"Sec. 8. 2. Independent Contractors and Their Employees. An independent contractor is not a servant of his employer. The relation of master and servant does not exist between an employer and the servants of

an independent contractor, nor between an independent contractor and the servant of a subcontractor, and he is not responsible as master, either to or for them."

In considering the situation in the Caribbean Embroidery Cooperative, Inc., we find that not a single one of the elements which go to make up the relation of master and servant are present as between the worker-members of the Cooperative and themselves as owners of the Cooperative.

(a) The laborers control all the terms of their own work.

(b) They receive calculated advances to live on and the surplus is divided at the end of the year.

(c) The laborers control absolutely the acceptance or rejection of orders. They may decide not to accept any orders at all for as long as they wish. They may reject some where prices are too low (as was actually done) or they may accept those with low prices in conformity with market conditions.

(d) The surplus at the end of the year is distributed on the basis of the *work done*, not on the basis of stock ownership.

(e) Work goes only to members.

(f) The laborers control absolutely the admission of new members and the expulsion of old members. In case of expulsion by the Board of Directors, an appeal lies to the general assembly of all members.

(g) As to members who have not paid up to 25% of their share of stock or $2.50, while they have no vote in the assembly, they take part in discussions and have a vote in the process groups in nominating members of the Board of Directors.

There are, of course, as mentioned above, a great many types of cooperatives and it would be impossible to state

generally that every cooperative is not an employer. Each cooperative so far as the employer-employee relationship is concerned, would have to be examined separately to ascertain the facts.

A cooperative system has been defined in 13 Corpus Juris 932 as follows:

> "A union of individuals, commonly laborers or small capitalists, formed for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital labor contributed by each member."

Compare *Finnegan* v. *Knights of Labor Building Assn.*, 18 L. R. A. 778.

Were it not for statutory permission to incorporate specially, this Cooperative would be an "Association" (5 C. J. 1330) or Union or Partnership.

In 18 C. J. S., p. 127 is a quotation from another case defining co-operatives:

> "The words 'cooperative, company, corporation, or association' are defined to mean a company, corporation, or association which authorizes the distribution of its earnings in part, or wholly, on the basis of, or in proportion to, the amount of property bought from or sold to members, or to members and to other customers, *or of labor performed or other services rendered to the corporation.*" Chaffee *v.* Farmers' Cooperative Elevator Co., 168 N. W. 616, 617, 39 N. D. 585."

Looking at the human side of this question, one would think that under conditions prevailing in Puerto Rico with its overcrowded population and chronic unemployment, the Government would encourage labor cooperatives, not only because such cooperatives would furnish some living for the workers, but also because in the long run labor cooperatives should increase the dignity and moral stature of the

members. In the present case we find these workers forming the Caribbean Embroidery Cooperative, Inc., to do the only work they know how to do and in order to live, even if poorly. They do not know any magic formula by which they can live without working. They band together and very wisely select the most competent man they know to employ as their Manager. It is true that some of the worker-members are somewhat ignorant, but that certainly does not affect the nature of the Cooperative and the uncontradicted testimony in the Record shows that they are educating themselves rather rapidly. The testimony produced by the Government itself demonstrates this and also demonstrates that the Cooperative is a genuine labor cooperative which as a matter of law could not possibly be included within the terms of a statute designed to apply to employers and employees.

Point III.

The Caribbean Embroidery Cooperative, Inc., is a "labor organization" within the meaning of Section 3(d) of the Fair Labor Standards Act of 1938 and as such is exempt from the provisions of the Act.

A perusal of the Fair Labor Standards Act with special reference to Section 2(b) which is a part of the "Finding and Declaration Policy", shows that Congress very carefully considered the effect of the Act on different types of industries. In general a standard type of wage was fixed as a minimum. We might say that this was designed for the normal type of industry, where neither very high wages had been paid nor very low wages. But Congress recognized that in many industries, the normal type of minimum would be entirely too low. Consequently Section 5(e) of the law provided for Industry Committees which would have the power to examine into the situation of

industries able to pay better than the standard minimum and power was given these committees to fix minimum wages in certain cases which would be above the minimum established by the law as a general standard.

Equally Congress was concerned that the law should not reduce employment and earning power both. This might happen in some substandard industries until such industries could adjust themselves. This is a fair inference from the provisions of Section 2(b) taken with the provisions of Section 3(d). Section 2(b) reads as follows:

> "It is hereby declared to be the policy of this Act through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

And the pertinent part of Section 3(d) reads:

> "'Employer' * * * shall not include * * * any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

A labor cooperative is a "labor organization" and it is fair to infer that Congress had in mind labor cooperative in enacting Section 3(d) and Section 2(b). If Congress had meant "labor union", there is no reason why it should not have said "labor union". It is significant that the words used were "labor organization", which is broader. Further if Congress had meant "labor union", the exemption would have been practically meaningless, since unions, as a usual thing do not engage in production of articles for commerce as a union. To give any sense to the exemption of "labor organization", we have to turn to some such organization such as this Cooperative here in-

volved, which is both a "labor organization" and also engaged in the production of goods for commerce.

The reference in Section 2(b) "without substantially curtailing employment or earning power" must be given some meaning. Doubtless it was considered that the minimum wage in some industries or branches of industry might curtail employment to some extent, but this would be made up in the general social scheme from increased earning power. But certainly Congress could not have intended the law to destroy totally any industry (as actually happened in the needlework industry in Puerto Rico). Under the exemption of "labor organizations" it is logical that Congress may have had in mind that labor organizations on the cooperative basis could do something at least for themselves during an adjustment period. It would not be strange that the government should encourage cooperatives. The Farm Credit Administration is specifically directed to encourage cooperative marketing (12 U. S. Code 1141 c.) and their receipts are or have been exempt from income tax (26 U. S. Code 103). Labor cooperatives organized for pooling of labor and division of the product are certainly as worthy of encouragement as are marketing cooperatives—perhaps from the social standpoint, more so.

Conclusion.

The welfare and livelihood of thousands of workmen depend upon the decision in this case. We submit that this Court should issue certiorari in this case not only for the above reason, but also because the very important question is involved as to the application of the Act to labor cooperatives of the nature of the Caribbean Embroidery Cooperative, Inc. We submit that the court below erred in reversing the trial court on the facts of the case alone and that even if it should be found that some sort of tenuous

control on the part of Palmer exists in regard to the Co-operative, it is only such "control" as any Manager must necessarily exercise and would not affect the legal questions involved. We submit further that the decree of the Circuit Court of Appeals for the First Circuit should be reversed.

San Juan, Puerto Rico, January 8, 1942.

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